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IN THE

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

W. R. GRACE & Co.,
Petitioner,

against

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, PAN AMERICAN AIRWAYS, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CHICAGO AND SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA, and PAN AMERICAN-GRACE AIRWAYS, INC.,
Respondents.

No. 19520

PETITION FOR REHEARING OF RESPONDENT PAN AMERICAN AIRWAYS CORPORATION

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Pan American Airways Corporation, a respondent herein, respectfully petitions the Court to reconsider its opinion filed January 28, 1946, and to grant a rehearing of the above entitled petition for review.

The grounds of this application are as follows:

(1) The decision of the Court is based entirely upon the determination of issues which were not before the Court on the petition for review. The grounds upon which the Court relies in its decision were not dealt with in the briefs filed with the Court prior to the argument or in the oral argu-

ment. The theory of the Court's decision differs also from that set forth in the request for supplemental briefs made by the Court subsequent to the oral argument. The Court has not only determined an important question of administrative law without brief or argument thereon but, in effect, has deprived the respondents of their right to be heard;

(2) The Court's decision that the Civil Aeronautics Board, as an incident to a proceeding concerned with the public interest, may determine private disputes between stockholders of the sort ordinarily cognizable in a court of equity is directly contrary to the decision of the Supreme Court in *Pittsburgh & West Virginia Ry.* v. *U. S.*, 281 U. S. 479 (1930). The Court is mistaken in relying on *Securities and Exchange Commission* v. *Okin*, 325 U. S. 385 (1945), as in some manner qualifying or limiting the *Pittsburgh & West Virginia* case. This appears both from an analysis of the *Okin* case itself and from the recent decision of the Supreme Court, filed after the present case was submitted, in *Schenley Distillers Corporation, et al.*, v. *United States, et al.*, 66 Sup. Ct. 247 (1946);

(3) Even if the Board, in a proceeding properly designed for the purpose, had the power to determine such questions as whether the opposition of the respondent "to Panagra's applying for an extension was due to 'illegality and fraud'" (Op. 724),* to decide "as between Grace & Company and the Pan American Company, which should speak for Panagra" (Op. 725), and to rule "whether Panagra should be treated as applying for the extension" (Op. 727), it was error to hold that the Board could make such decisions in the proceeding the order dismissing which is here under review. The issues tried in this proceeding were purely and simply whether the *public interest* required a compulsory extension of Pan American-Grace's certificate. None of the issues which the Court has directed the Board to decide was presented by the order initiating this proceeding.

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* References "Op.—" are to pages of the printed opinion of this Court.

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I.

The decision of the Court rests solely on the determination of issues which were not before it on the petition for review. The Court has not only decided an important question of administrative law without the benefit of briefs or argument, but has deprived the respondents of their right to be heard.

The Court's opinion rests on a theory never advanced in the proceedings before the Board, in Grace's petition for review, or in the briefs or oral arguments of any of the parties before this Court. The theory is also sharply different from that put forward by the Court in its letter of November 29, 1945, requesting supplemental briefs. While this petition is in form a "Petition for *Re*hearing", it is thus in fact a request that the Court afford respondents an opportunity to be heard with respect to the theory on which the Court decided the case.

A brief statement of the issues before the Court and of the Court's decision is enough to demonstrate the correctness of this characterization.

The issues before the Court.

The issues presented to this Court for decision were the three issues raised by Grace's petition for review, to wit: (1) whether Grace has legal standing to secure review of the orders in Docket 779 which formed the subject of the petition for review; (2) whether the Board erred in deciding as a matter of law that it lacked statutory authority to compel the extension proposed; and (3) whether Grace had been denied a fair hearing on the issues on which the Board's decision was based; plus a fourth issue, added by Government counsel in their motion to dismiss the petition for review, namely, whether the order complained of was of a type that was subject to judicial review.

By letter of November 29, 1945, the Court put forward a tentative statement "of the nature and scope of the pro-

ceeding before the Board". This contained a suggestion, never previously advanced by anyone, that the Board's Dockets 707 and 744 might be deemed a part of the proceeding in Docket 779; that, since Grace's petition in Docket 744 had alleged that Pan American was engaging in unfair competition in contravention of Section 411 of the Act,* it might be possible for the Board in Docket 779 to order Pan American, *under Section 411,* to "cease and desist" from voting its stock in opposition to an application for the extension; and, as a final step, that since, as the tentative statement wrongly assumed, Grace's petition in Docket 707 was a part of the proceeding in Docket 779, the Board might be able, in the latter proceeding, to treat the petition *by Grace* in Docket 707 as an application *by Pan American-Grace,* derivatively filed, and proceed to grant relief under Section 401 (h)** as if a voluntary application had been made.

At the request of the Court, supplemental briefs were submitted by the parties, directed to the entirely new issues suggested by this tentative statement. No opportunity for oral argument was afforded, although this respondent requested that the case be set for further argument if the Court was not persuaded by the briefs.

The decision of the Court.

Except for the issues as to Grace's legal standing to secure a review and as to the immunity to review of the orders complained of, which were decided by implication favorably to Grace, *all of the issues set out above* were either decided or resolved *arguendo* in a manner favorable to the positions taken by respondents. Thus, the Court assumes that the Board was right in its holding if the case was to be regarded as it always had been—namely, as a compulsory extension proceeding. It concedes that Dockets 707 and 744 were not included in the proceeding (Docket 779) the order dismissing which is here under review, and that no question of relief under Section 411 is

* 49 U. S. C. §491.

** 49 U. S. C. §481(h).

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involved. The Court likewise agrees that the proceeding in Docket 779 began as a Section 401 (h) proceeding and so continued throughout. It upholds respondents' position that the scope of the proceeding is to be measured by the directory part of the Board's order instituting the proceeding, and not by recitals in that order nor by what the parties said in argument, in briefs, or in the course of the hearings. The Court thus agrees that the issues before the Board were limited to a determination of whether public convenience and necessity required the extension proposed (Op. 721-23).

However, in spite of all this, the Court proceeds to decide *against* the respondents, on the basis of the wholly novel suggestion that the Board had power, which it *must* exercise, to determine *in this proceeding* whether Pan American had so exercised its voting power in Pan American-Grace as to be guilty of "illegality and fraud"; that, if such charges could be established, the Board should then consider that Grace, speaking for Pan American-Grace, should be deemed to have filed *in this proceeding* an effective "consent" to the extension on behalf of Pan American-Grace; and that this in some way would permit the Board to treat the existing compulsory proceeding under Section 401(h) as a voluntary proceeding under Section 401(d),* so that the Board could determine whether public convenience and necessity required the extension exactly as if a voluntary application had been filed.

We will show in Points II and III below why we consider the Court's decision to be wrong. What we seek to bring out in this Point is that the Court has made determinations which are so novel and which have such important implications upon the jurisdiction of Federal administrative agencies as to require full briefing and argument, and that the Court has not given the respondents the hearing which the law requires.

A decision that in a certificate proceeding a Federal administrative agency concerned with transportation must consider issues of fraud and illegality as between stock-

* 49 U. S. C. §481(d).

holders, introduces, to say the least, a new notion in administrative law. The Civil Aeronautics Board is concerned with the interest of the public and of the respective air carriers,—not with disputes internal to a particular carrier. The finding of public convenience and necessity contemplated by Section 401(h) of the Act is a finding whether the proposed certificate amendment is desirable from the standpoint of *public* welfare, not whether one stockholder in an air carrier has acted prejudicially to the *corporate* welfare by refusing to sanction a request for such an amendment. While the Board can doubtless take an intra-corporate dispute into account in a certificate proceeding *in determining the fitness and ability* of a carrier to operate additional air service, there is nothing in Section 401 of the Act to indicate that the Board has power to take action resolving the dispute or determining the legal rights and duties of contesting stockholders. Certainly a decision so extending the jurisdiction of Federal administrative agencies concerned with the regulation of transportation ought not be made to meet a particular fact situation or without the fullest opportunity for argument. Especially is this true under a statute which prohibits the court's even considering an objection to an order "unless such objection shall have been urged before the Board or if it was not so urged, unless there were reasonable grounds for failure to do so". Civil Aeronautics Act, §1006(e).*

The decision of the Court, based as it is on a determination of issues which have not been raised, briefed or argued before the Board or before this Court, is a denial of a fair hearing to respondents and is opposed to the universal rules of appellate practice that a reviewing court will not consider points not raised before it by the parties and that a reviewing court may not change the theory on which a cause was tried below. *Blair* v. *Osterlein*, 275 U. S. 220 (1927); *Jones* v. *Tower Production Co.*, 120 F. (2d) 779 (C. C. A. 10th, 1941); *Hutchinson* v. *Fidelity Investment Ass'n*, 106 F. (2d) 431 (C. C. A. 4th, 1939); *Osgoodby* v. *Talmadge*, 45 F. (2d) 696 (C. C. A. 2nd, 1930).

* 49 U. S. C. §646(e).

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II.

The decision of the Court that the Civil Aeronautics Board, as an incident to a proceeding concerned only with the public interest, must determine private disputes between stockholders of the sort ordinarily cognizable in a court of equity is directly contrary to the decision of the Supreme Court in *Pittsburgh & West Virginia Ry.* v. *U. S.* The Court is mistaken in relying on *Securities and Exchange Commission* v. *Okin* as qualifying or limiting the *Pittsburgh & West Virginia* case.

The decision of the Supreme Court in *Pittsburgh & West Virginia Ry.* v. *U. S.*, 281 U. S. 479 (1930), is a square authority that, in the absence of special statutory provisions, Federal administrative bodies have no power to inquire, in proceedings properly before them, into collateral issues raised by disputes between stockholders as to who has the right to speak for a carrier. The essence of the decision there was that a Federal administrative body must take the carrier as it finds it, and that disputes between the carrier's stockholders are left for determination to the courts of general jurisdiction. That decision is controlling here unless later decisions of the Supreme Court have impaired its authority. This, indeed, is recognized by the Court itself (Op. 723).

Because of this, and because there has been no opportunity to discuss the point in previous briefs or argument, it becomes necessary to analyze in some detail both the decision in the *Pittsburgh & West Virginia* case and the later decision thought by the Court to have weakened it.

A. The *Pittsburgh & West Virginia* case rules the instant case.

In the *Pittsburgh & West Virginia* case, the Pittsburgh & West Virginia Ry. Co. (hereinafter referred to as "the Pittsburgh") was a minority stockholder in the Wheeling &

Lake Erie Ry. Co. (hereinafter referred to as "the Wheeling"). The Wheeling applied to the Interstate Commerce Commission for certificates of convenience and necessity under Section 1(18) to (20)* of the Interstate Commerce Act, one for permission to abandon its existing station in Cleveland, and the other for authorization to use the facilities of a proposed union terminal which was being built by carriers owning a majority of the Wheeling's stock.

The Pittsburgh raised before the Commission questions both public and private in character. Among the latter was a claim that directors who had authorized the Wheeling's applications had been elected by stock owned by carriers which had an interest in the new terminal project adverse to that of the Wheeling and which had acquired their stock in the Wheeling in violation of the anti-trust laws. In other words, the Pittsburgh claimed, in effect, that it, rather than the Wheeling's directors, was entitled to "speak for" the Wheeling, and that the certificate application filed by the directors in the name of the Wheeling should be disregarded. The Commission granted the applications, ruling favorably on the issues of public interest and holding that the private controversies between the Pittsburgh and the other stockholders of the Wheeling were not within its jurisdiction.

The Pittsburgh then brought a bill in equity in the District Court for Northern Ohio, naming as defendants the Wheeling, various other carriers which were stockholders in the Wheeling, the Interstate Commerce Commission and the United States, to enjoin the Wheeling from abandoning its present station and performing its contracts to utilize the union terminal, and to set aside the order of the Commission granting certificates of public convenience and necessity for abandonment and new operation. The case came on for hearing before a three-judge court convened pursuant to the Urgent Deficiencies Act, 38 Stat. 208, 219-220. The lower court held that the bill united two different causes of action, a suit under the Urgent Deficiencies Act

* 49 U. S. C. §1(18-20).

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to enjoin the enforcement of the Commission's order, and a suit based upon diversity of citizenship between the Pittsburgh and the carrier defendants. The three-judge court sustained the Commission's order on the merits. The District Judge concurring in the judgment, the court also directed the dismissal, on the merits, of the portion of the bill seeking relief against the carrier defendants, reserving to the Pittsburgh the right to sever the latter issues for purposes of appeal and to treat the decision on them as that of a single judge.

The Pittsburgh prosecuted a direct appeal to the Supreme Court from the entire decree. With the portion of the Supreme Court's opinion which ruled that the Pittsburgh had no standing to obtain review of the Commission's order, we are not now concerned. For present purposes, the vital point in the Supreme Court's decision, and one which is decisive against the ruling now made by this Court, is the holding that insofar as the Pittsburgh's suit sought relief against the Wheeling and its majority stockholders, such a bill could not properly be joined with a bill to enjoin the Commission's order. For, as said by Mr. Justice Brandeis, such a suit was "neither ancillary to nor dependent upon the judgment as to the order."

If the Commission could properly have taken cognizance of the Pittsburgh's claim that the Wheeling's application to the Commission had been filed as a result of action of the Wheeling's directors which was adverse to the Wheeling's interests, the portion of the Commission's order rejecting this claim of the Pittsburgh would have been a proper subject of a bill for an injunction before a three-judge court, and the suit against the Wheeling and its majority stockholders would clearly have been ancillary thereto. The Supreme Court's decision that the Pittsburgh's protest against the action of the Wheeling directors could be heard only in a stockholder's suit in a court of general equity jurisdiction, is thus a clear holding that such issues were not properly cognizable in the administrative certificate proceeding.

The direct application of the *Pittsburgh & West Virginia* case to the case at bar is manifest. If, as the Supreme Court held, it would have been beyond the jurisdiction of the Interstate Commerce Commission to inquire whether the Wheeling's applications for certificates were filed as a result of "illegality and fraud" on the part of the Wheeling's directors or stockholders, it is equally beyond the powers of the Civil Aeronautics Board to determine similar issues with respect to the *failure* of Pan American-Grace to file an application for a certificate desired by one of the stockholders and not by the other.

This Court recognizes in its opinion that the problem before the Supreme Court in the *Pittsburgh & West Virginia* case was essentially the same as that arising here. It says that "in spite of some differences which we will point out, we might feel that decision conclusive here, were it not for the decision in *American Power & Light Co.* v. *Securities and Exchange Commission*, 325 U. S. 385, particularly that part of it which dealt with Okin's appeal" (Op. 723). So far as we can see, the Court does not point out the differences referred to and, as we will now show, the Court was mistaken in its belief that the *Okin* case had in any way impaired the controlling effect of the *Pittsburgh & West Virginia* decision upon the instant case.

B. The *Okin* case in no way impairs the authority of the *Pittsburgh & West Virginia* case.

The *Okin* case involved the right of a stockholder to secure review, under Section 24(a) of the Public Utility Holding Company Act of 1935 (15 U. S. C. 79x(a)), of approval by the Securities and Exchange Commission of a financial transaction affecting the corporation in which he held stock.

The proceedings before the Securities and Exchange Commission had begun on joint applications and declarations filed by American & Foreign Power Co., and its parent Electric Bond & Share Co. under sections 6(a), 7, 9(a)(1), 10, 12(b), (c), (d) of the Public Utility Holding Company Act* and Rules U-23, U-42, U-44, U-45 and U-50 of the

* 15 U. S. C. 79f(a), 79g, 79i(a)(1), 79j, 79l(b)(c)(d).

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regulations thereunder. These applications and declarations sought approval of a plan under which American & Foreign Power would refinance a $35,000,000 note held by Electric Bond & Share by issuance to Electric Bond & Share of 3% serial notes for $30,000,000 and a cash payment of $5,000,000. Electric Bond & Share sought permission also to sell bonds of other subsidiaries and use the proceeds, together with the $5,000,000 received from American & Foreign Power, to purchase its own preferred stock in the open market to offset loss of income from the refinancing.*

Okin, a stockholder of Electric Bond & Share, appeared in the proceedings before the Commission. He urged that the income of Electric Bond & Share would be reduced as a result of the refinancing, thus reducing the value of his stock. Over his objection, the Commission granted approval. Okin thereupon sought review of the Commission's order and the Supreme Court, affirming a decision of this Court, held that Okin was a "person or party aggrieved" within the meaning of Section 24(a) of the Public Utility Holding Company Act.

The question before the Securities and Exchange Commission on Electric Bond & Share's applications was not merely whether the proposed transactions were consistent with the public interest generally, but also, in the language which runs through the Public Utility Holding Company Act, whether they were consistent with "the interest of *investors* or consumers". The Securities and Exchange Commission thus had to consider not only whether the transactions were in the interest of Electric Bond & Share considered as a corporate entity, but also whether they were in the interest of each of its security holders. This being the question which the Securities and Exchange Commission must decide, it is altogether natural that the Commission requires notice to be given not only to the corporations which are parties to the transactions but directly to security holders, either through mailing or through publication in

* *In the Matter of Am. & Foreign Power Co., Inc.; Electric Bond & Share Co.*, S. E. C. Release No. 4855, Jan. 25, 1944.

the Federal Register (Rule U-23), and permits such security holders to appear. When such a security holder appears before the Securities and Exchange Commission in opposition to a proposed transaction, it is not necessary that he establish that the management was guilty of illegality or fraud in proposing the transaction. All that he need show is that the transaction will not conform to the requirement of investor protection prescribed in the Act.

In other words in a Public Utility Holding Company Act proceeding such as that in the *Okin* case, a stockholder has a standing separate and apart from the corporation. It was in recognition of this that the Supreme Court sustained Okin's status to seek review. The Supreme Court did not have its decision, as this Court seems to believe, upon the ground that Okin might be heard to assert derivatively a right of the Electric Bond & Share Company, but on the broader view that, quite apart from any question of derivative right, he fell within the comprehensive language of Section 24(a). As the Supreme Court said (p. 392), "we do not deem it essential that the proceeding have the character of a derivative suit."*

Putting the matter in another way, the Public Utility Holding Comany Act of 1935 had already taken final determination of the question whether the refinancing proposed by Electric Bond & Share was or was not consistent with the interests of its *stockholders* from the management of that corporation and vested it in the Securities and Exchange Commission. The Supreme Court's holding was simply that a stockholder whom that Commission had heard was a "person or party aggrieved" who could seek judicial review. Such a holding is in no way inconsistent with the *Pittsburgh & West Virginia* decision that a Federal administrative agency concerned with carriers and not with their stockholders is to take applications or lack of applications as it finds them and is not to determine whether, as in the

* Apparently not only a stockholder but a consumer could be a "person or party aggrieved" entitled to petition for review under Section 24(a) of the Public Utility Holding Company Act. See *Associated Industries* v. *Ickes*, 134 F. (2d) 694 (C. C. A. 2d, 1943), and particularly footnote 31 to the opinion of Judge Frank.

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Pittsburgh & West Virginia case, the making of the application, or, as in this case, the failure to make one, was due to "illegality and fraud". Certainly there is nothing in the *Okin* case which remotely supports the proposition that Federal administrative agencies having jurisdiction over transportation have been empowered to go into a dispute between stockholders as to whether an application for a certificate should be made and, if it decides in favor of the party advocating the application, to exercise the power of an equity court to take *pro tanto* the management of the corporation into its own hands and convert a compulsory extension proceeding into a voluntary one.

The suggestion that the authority of the *Pittsburgh & West Virginia* case was in any way impaired by the decision in the *Okin* case thus overlooks the difference between the statutory duties of the Securities and Exchange Commission and of Federal agencies concerned with transportation. It depends upon placing the *Okin* decision on a ground on which the Supreme Court expressly declined to rely. And, if this were not enough, it confronts two other difficulties as well. The first of these is that in the *Okin* opinion the Supreme Court expressly cited the *Pittsburgh & West Virginia* case without in any way reflecting on its authority. The second is that any possible doubt as to the continued standing of the *Pittsburgh & West Virginia* case has been removed by its recent approving citation by the Supreme Court in a decision announced after this case was submitted, *Schenley Distillers Corp. et al.*, v. *U. S. et al.*, 66 Sup. Ct. 247 (1946).

C. The rule of the *Pittsburgh & West Virginia* case is sound.

The rule of the *Pittsburgh & West Virginia* case rests upon considerations fundamental to the administrative process. It recognizes that administrative agencies should not be diverted from their duties of carrying out a regulatory statute in the *public interest* by time consuming proceedings to adjudicate mere private legal rights. Under the rule announced by the Court in this case, any stockholder of an air

carrier who disagrees with the management of his company as to the wisdom of applying for a particular route, by merely alleging "fraud" and "illegality", however flimsy the bases of these allegations may be, can force the Board not only to determine whether these charges are established, but also, since the issues are "intricately intermeshed" (Op. 727), to consider whether public convenience and necessity require the particular service proposed. It is one thing to say that the duty of considering complaints of this character, in holding company cases on which it must pass in any event has been imposed upon a body like the Securities and Exchange Commission which is expressly charged with the protection of investor interests. It is quite another thing for a court to impose such jurisdiction on an agency charged with protecting the public interest in air transportation, where there is not the slightest indication in the statute that such was the will of Congress.

There is little reason for supposing that Congress would have desired to take such issues of private right from the courts and vest them instead in an administrative agency such as the Civil Aeronautics Board. The peculiar competence of administrative agencies cannot be deemed to extend beyond matters related in some fairly direct way to the purposes of the statute under which the particular administrative body functions. The overall purpose of the statute creating the Civil Aeronautics Board is the advancement of the *public* interest by the promotion of civil air service. The Board's special competence relates to the special economic and operational characteristics of airplanes and the service afforded by them. On the other hand, a proceeding in the nature of a minority stockholder's suit raises issues fundamentally legal in nature and of a sort customarily dealt with by courts of general jurisdiction. An administrative body has no special competence to deal with legal issues of this kind. Indeed, the task which the Court has imposed upon the Board of considering the same fact, first from the purely legal standpoint of private right, and second from the broad economic standpoint of public interest, without allowing its views on the second issue to affect its decision of the first is an almost impossible one to perform.

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From the standpoint of protection of the stockholder also, it does not seem likely that Congress intended to take jurisdiction over intra-corporate disputes of transportation companies from the courts and confer it upon Federal administrative agencies. Historically, except for certain narrow exceptions, the power to take the management of a corporation out of the hands of its directors and to allow one stockholder to speak for the others has inhered in courts of equity and in them alone. In a proceeding before such a court, a stockholder has the protection of the rules of evidence and of the judicial process generally, as well as the privilege of full review by an appellate court. If, on the other hand, jurisdiction over such disputes lies in an administrative agency, a stockholder enjoys none of these rights in the course of the trial, and upon an attempt to secure review encounters the contention of administrative finality on questions of fact and perhaps on "mixed questions" of law and fact as well.

Actually, in the present case there is the gravest doubt whether if the Board were to decide the issues directed by the Court in a manner adverse to Pan American, the respondent could secure *any* judicial review at all. The Court specifically directs the Board to decide the issues whether Grace is entitled to speak for Pan American-Grace and whether the public convenience and necessity require the extension to be granted, not *seriatim* but together (Op. 727). A decision determining both of these issues in favor of the contentions of Grace would be subject to the approval of the President under Section 801 of the Act.* Under the decision of this Court in *Pan American Airways* v. *C. A. B.*, 121 F. (2d) 810 (C. C. A. 2d, 1941), there would be serious doubt whether there could be judicial review of the Board's determination even of the purely legal issues raised by the stockholder suit aspect of the case. It is not lightly to be assumed that Congress intended the private rights of stockholders in companies engaged in foreign air transportation to be left to such conclusive administrative determination or, indeed, that it constitutionally could do so.

* 49 U. S. C. §601.

III.

Even if the Board has power to decide the issues of private right referred to it by the Court, it cannot exercise that power in this proceeding.

The Court seems to be proceeding on the assumption that the Board can now promptly proceed to decide the issues of "fraud" and "illegality" referred to it by the Court. This, we respectfully submit, is quite contrary to the fact.

As discussed in Point I above, this proceeding has never been considered by the Board nor by any of the parties as involving questions of "fraud" or "illegality", the adjudication of such questions, or the possibility of affirmative action thereon. The Board's order of September 10, 1942 instituting the proceeding certainly contained no notice that such action was contemplated. If such issues are now to be determined by the Board, Pan American and all other parties must be given an opportunity to adduce and direct evidence to these new issues, and also to present briefs and oral argument thereon. *Morgan* v. *U. S.*, 304 U. S. 1 (1938); *Ohio Bell Tel. Co.* v. *Comm'n.*, 301 U. S. 292 (1937).

On the other hand, if the Board's opinion is affirmed, while Docket 779 is terminated, Dockets 707 and 744 remain pending. Whatever powers the Board may ever have had to deal with this controversy, except on the theory of compulsory extension as to which the Court does not disagree with the Board's conclusions, remain unimpaired by the order here under review, and can be exercised with as much despatch as they can be in Docket 779. The situation is wholly different from that in *Ashbacker Radio Corp.* v. *F. C. C.*, 66 Sup. Ct. 148 (1945), where the action of the Federal Communications Commission in granting the application of one applicant for all practical purposes denied the other applicant the right to the hearing contemplated

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by Congress. In view of this, it is difficult to see any conceivable advantage in attempting to force an adjudication of questions of alleged abuse of voting power by Pan American *into the present proceeding*, which has gone forward to date under an entirely different theory.

We cannot escape the impression that the Court's action was inspired in large part by a fear that, as a result of the pendency before the Board of the *Latin American Certificate* case, Docket No. 525, a decision affirming the Board's order of dismissal and remitting Grace to the remedies of a stockholder's suit or of proceedings in Dockets 707 and 744 might, for practical reasons, be an empty gesture. Apart from the fact that the courts have been continuously open to Grace since 1938 when this dispute commenced, and that it has likewise been possible for Grace through much of this period to press the Board to take action in Dockets 707 or 744, the answer to this fear is that the remand directed by the Court likewise will involve further proceedings before the Board and that less time would be taken in an appropriate proceeding where the issues were properly framed than by attempting to use a record nearly three years old which was developed on entirely different theories. Grace has already made a motion in Docket 525 that the Board withhold any recommendation to the President or withdraw any recommendation already made for the certification of any carrier other than Pan American-Grace between Balboa and Miami until the further proceedings in Docket 779 which the Court has directed are had. Grace could have made, and can still make, the same request with reference to proceedings in Dockets 707 and 744.

Wherefore, for the reasons stated, respondent Pan American Airways Corporation respectfully prays that rehearing be granted and that this petition for review be placed upon the calendar for reargument upon new briefs and upon such reargument, that the petition for review

be dismissed or the orders of the Civil Aeronautics Board be affirmed.

Dated February 11, 1946.

Respectfully submitted,

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JAMES P. KRANZ, JR.,
JOHN P. APICELLA,
of Counsel.

Certificate

I hereby certify that the foregoing application for rehearing is not made for purposes of delay, but because in the opinion of counsel for respondent Pan American Airways Corporation the Court has misinterpreted certain decisions of the Supreme Court which I believe to be controlling in this proceeding, and has decided this cause upon issues which, through no neglect or fault of counsel, have not been briefed or argued. I believe the foregoing petition for rehearing to be well founded in law and that the same is proper to be presented and filed.

(Signed) HENRY J. FRIENDLY.

HENRY J. FRIENDLY,
Attorney for Pan American Airways Corporation.